

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

EXPLORICA, INC.

Plaintiff,

v.

ELDERHOSTEL, INC.
d/b/a EXPLORITAS,

Defendant.

Civil Action No. 09-11719

**PLAINTIFF EXPLORICA INC.'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF
THIRD PARTY USE OF MARKS CONTAINING "EXPLOR"**

Plaintiff Explorica, Inc. ("Plaintiff" or "Explorica") requests that the Court exclude the "evidence" identified by Defendant Elderhostel, Inc. d/b/a Exploritas on its exhibit list and any other similar evidence that Defendant may offer concerning purported third party use of trademarks containing "EXPLOR-." The proffered evidence consists of copies of third party trademark registrations and images of third party webpages. As set forth more fully in the accompanying Memorandum of Law, this evidence is not legally relevant to its argument that EXPLORICA is a commercially weak mark for two independent reasons: (1) The documents do not evidence third party use of *EXPLORICA*, rather they look to EXPLOR formative marks, the use of which are irrelevant to the strength of EXPLORICA as a matter of law (*See, e.g., AutoZone, Inc. v. Tandy Corp.*, 373 F.3d 786, 794-795 (6th Cir. 2004)); and (2) the documents do not evidence third party *use* and the scope of such use, which is necessary for the evidence to have any affect on the commercial strength of EXPLORICA (*see, e.g., EMC Corp. v. Hewlett-Packard Co.*, 59 F. Supp. 2d 147, 151 (D. Mass. 1999)).

For these reasons, and those set forth more fully in Explorica's Memorandum, the Court should exclude Elderhostel's evidence of third party use of marks containing "EXPLOR."

Respectfully submitted,

EXPLORICA, INC.

By its attorneys,

/s/ Mark S. Puzella

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Dated: February 8, 2010

LOCAL RULE 7.1(A)(2) CERTIFICATE AND CERTIFICATE OF SERVICE

I, Mark S. Puzella, hereby certify that February 8, 2010, counsel for Explorica conferred in good faith with counsel for defendant, Elderhostel, Inc., concerning the matter set forth herein and the parties were unable to reach an agreement.

I further certify that a true copy of this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on February 8, 2010.

/s/ Mark S. Puzella